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October Term, 1962

No. 45

SALVATORE PANICO, *Petitioner*

—v.—

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

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No. 633

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—v.—

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

I

This brief is filed in reply to both the Government's Brief in Opposition and the "Supplement" to that Brief.

At the outset we note that the "Supplement" to the Government's Brief in Opposition bears the sole signature of the Solicitor General himself. We are unfamiliar with the conventions of the Solicitor General's office in this respect, but if the Solicitor General's presentation of a brief to this Court bearing only his own signature carries a connotation of his special official concern in the particular

matter, then the instant petitioner is indeed put under an even heavier statistical disadvantage than ordinarily operates for the average run of certiorari applications in this Court.

Whether we are correct or not in our above suggestion that the Solicitor General may consider it exceptionally important to the Government that this particular petition for certiorari be denied, the treatment in the Government's two briefs opposing this petition is unusual in several respects and obliges us to submit this reply.

The main feature of the Government's two briefs to which we address ourselves is the factual theme that petitioner Salvatore Panico's own contempt case, and apparently even the question of his mental competency, are dispositively affected (adversely to petitioner) by the record of the conduct of his co-defendants in the narcotics trial. The Government's treatment of the facts as to the conduct of those other defendants is not free from serious factual flaws, some of which we note *infra*. However, our main and short reply to all of this collateral matter adduced by the Government is that if a hearing under Rule 42(b) were to result in an adjudication that Salvatore Panico could not entertain the requisite scienter to commit contempt by reason of his mental condition, no facts relating to other defendants would have any relevance. And, perhaps even more to the point, how can the question of the relevancy of the conduct of other defendants be judicially decided in the sort of cart-before-the-horse inquiry which the Government is asking this Court to make *via* the foreshortened avenue of a proceeding on petition for a writ of certiorari? The insuperable difficulties, not to say the sheer unfairness to

the petitioner, in resolving these questions in the manner which the Government proposes, are aggravated, moreover, by the prodigious size of the narcotics trial record.*

II

In our footnote, *supra*, we refer to the supplemental materials which we filed with the Clerk of this Court under cover of our letter of January 25, 1963. The sheer physical difficulties of the "record" in this case, as just mentioned, prompt us, both in our own interest and for the Court's convenience, to invite the Court's further attention to those supplemental items which we filed and to our purpose in doing so. There were three items: (1) extra copies of the contempt certificate of the Trial Judge (containing the contempt specifications); (2) nine copies of our printed supplemental appendix in the appeal from the narcotics conviction which is presently pending in the Court of Appeals for the Second Circuit; and (3) nine copies of our printed brief in the last-mentioned appeal. What we especially desire to bring to the Court's attention concerning these supplemental items is that at pages 6-42 of the Statement of Facts in the printed brief just referred to, and in Points II to V, inclusive (pp. 44-61) of that brief, there is extensive treatment of matters which are relevant to this petition for certiorari, with what we think are meticulous citations to

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* We owe the Court an explanation, if not an apology, concerning our not having filed the entire record of the narcotics trial. We thought, perhaps mistakenly, that the supplemental materials which we filed with the Clerk of this Court under cover of our letter of January 25, 1963, were adequate. Were it not for the Government's insistence that the entire trial record is needed—in order to evaluate the conduct of petitioner's co-defendants—we should still say that those supplemental materials which we filed are adequate.

the stenographic minutes of the narcotics trial; also, many of the more important portions of those trial minutes which are cited in our aforesaid printed brief in the Court of Appeals are set forth *in extenso* in the aforementioned printed supplemental appendix of which we have filed nine copies in this Court. In view of the Government's representations to this Court concerning various happenings in the trial of the narcotics case, and in view, once again, of the all-but prohibitive difficulties presented by the physical size of the trial record of that case, we earnestly request this Court to read the portions of our aforementioned printed brief in the Court of Appeals just referred to and to note our citations to the trial minutes which are contained in that brief. In making this emphasized request that this Court should take into consideration a brief filed in another proceeding—a document which we well realize is technically not "before" this Court—we are motivated, as above stated, by the earnest belief that the granting of this request would be both a convenience to the Court and an act of justice to the petitioner, and is something which is justified by the peculiarly difficult circumstances of physical access to the "record" in this case.

III

Among the factually flawed statements in the Government's two briefs to which we above alluded, are the following:

A. The Government's treatment of the imputed *mala fides* of the petitioner and various co-defendants in regard to their difficulty in obtaining counsel, classically illustrates, we submit in all sincere respectfulness, how even the very truest model of a busy Solicitor-General-of-good-will may

be led into simplistic recital of "facts". If this Court should hearken to our request that it read the copies of our printed brief in the Court of Appeals in the appeal from the narcotics conviction (filed with our supplemental materials herein as of January 25, 1963), it will discover the following items which apparently eluded the attention of the Solicitor General and his staff: (1) Several of petitioner's co-defendants in the narcotics trial whose difficulty in obtaining counsel the Government derides in its two briefs herein, had to make application to the variously-assigned Judges of the Southern District of New York, between the times of the first and second trials of the narcotics case, for assignment of counsel, applications which were granted (it must be presumed only after due judicial deliberation) *per* the assignment of attorneys of unimpeachable integrity from the Legal Aid Society and leading Wall Street law firms. (2) The understandable difficulty of obtaining *assigned* counsel for those co-defendants of petitioner—counsel who knew that they would face in advance the stern fact that they would perforce be "out of circulation" for a period of many weeks or months if they undertook the re-trial of this mass-conspiracy narcotics prosecution—was a prime, if not the decisive, factor in the delaying of the re-trial from June, 1961 to March-April, 1962. (3) In suddenly and peremptorily "assigning" Mr. Todaro, on the morning of April 2, 1962, as trial counsel for the petitioner in the narcotics trial, owing to the absence of petitioner's engaged counsel, Mr. Aronne, the Trial Court was doing the following things: It was refusing to acknowledge the fact that, by its utterly fictional declaration to counsel a few days previously that they were "actually engaged" in this trial, it had rendered petitioner's engaged counsel, Mr. Aronne, absolutely help-

less to forefend a supervening mandate by another court (which in fact happened) forcing him to trial in another case in which he was engaged as counsel. Mr. Todaro, the attorney who was "assigned" to take over Mr. Aronne's duties on the morning of April 2, 1962, was, figuratively, dragged into this "assignment" by the nape of his professional neck just as he was leaving the courtroom after having been displaced from the case by another defendant who had engaged substitute counsel; and Mr. Todaro knew nothing whatever about petitioner's case. Furthermore, Mr. Todaro was simultaneously "assigned" to serve as counsel for still another defendant, Loicano, whose interests in this trial were strongly antithetical to petitioner's interests. (4) During the absence of petitioner's counsel of his own choice (Mr. Aronne), and during the impasse of petitioner's declination (justified, as we maintain) to cooperate with his "assigned" counsel (Mr. Todaro), the trial proceedings encompassed the selection of the jury, the opening statements to the jury, and the entire testimony on the substantive counts of the indictment (involving defendants Bentvena and Struzzieri) which were vital to both the prosecution and the defense because the proof under those counts included the most inflammatory physical evidence in the case, namely, fearsome quantities of seized heroin—Bentvena and Struzzieri being named also in the conspiracy count of the indictment, under which petitioner was convicted in this narcotics trial. (5) The entire story of the difficulties or alleged difficulties of the petitioner's co-defendant Galante in regard to representation by counsel has been distressingly over-simplified by the Government. This issue of co-defendant Galante's denial of the right to counsel was extensively treated in his brief in the

pending appeal in the Court of Appeals for the Second Circuit from the conviction in the narcotics case. We are filing, together with this reply brief, the single copy of that brief which is presently in our hands, and we respectfully refer the Court to pages 14-26, and 40-48 of that brief of Galante so that the Court may at least have available to it some indication of the way in which the Government has telescoped this phase of the alleged conduct of petitioner's co-defendants as presenting an issue which supposedly affects petitioner's right to a writ of certiorari in the instant proceeding. (6) For reasons similar to those just mentioned as to Galante's difficulties with representation by counsel, i.e., to present the matter in a fairer light than is done in the Government's two briefs herein, we are filing with this reply brief the single copies presently available of the printed appendix (see pp. 3a-20a), the brief (see pp. 9-12) and the reply brief (see pp. 11-13) filed in the appeal in the narcotics case by petitioner's co-defendant Loicano.

B. The Government's two briefs opposing the writ herein may be read in vain for any indication of, or merest clue to, the fact that a prime, if not the principal, issue in the presently pending appeal from the narcotics conviction in the Court of Appeals is the issue of fair trial which arises from the extraordinary conduct of Trial Judge MacMahon in that narcotics trial. Again, should this Court see fit to examine the copies of our printed brief in the pending appeal in the Second Circuit, it will have what we believe is an objective portrayal of a species of conduct by a Federal District Judge which may well be without precedent, for intemperateness and insupportable provocativeness towards defendants and defense attorneys, since the days of the ill-

omened Circuit Judge Chase during the period of enforcement of the Alien and Sedition Laws of the administration of the first President Adams. Our printed brief in the Court of Appeals filed herein, which we are hoping that this Court will examine, points out, for example, the following: (1) On the day after petitioner's major outburst (May 23, 1962) the following occurred (we quote from our said printed brief at pages 31-32):

> "The next day, at the outset of the session, the Court said that Salvatore's outburst was 'planted' (5664), and the Court derided the statement of one of the other defense attorneys that 'we were shocked' (5664). A few moments later the Court all but directly accused the Panicos' attorney of having staged the outburst—'I want an affidavit from you, Mr. Aronne, on my bench by tomorrow morning telling me the reason why you requested coverage for yesterday and where you were' (5666); and see 5669, where Mr. Aronne protested to the Court that 'You are looking at me as though I precipitated this disturbance yesterday'. The Court's outraged feeling of being the victim of a plot by the entire defense, including the attorneys—among whom were assigned counsel from the Legal Aid Society and from leading Wall Street firms—took concrete form on that same day (May 24-1962) in a series of punitive and admonitory orders which the Court addressed to the assembled defense attorneys in the staccato manner of a punitive overseer prescribing corporal punishment to servile malefactors under his charge (5663 *et seq.*). For additional similar treatment meted out by the Court to defense attorneys following this Salvatore Panico episode, see 5793-5806, 5872, 5928-5932, 6156, 6161, 6074."

(2) After the petitioner had been initially examined by psychiatrists (May 25-May 29, 1962—see our aforesaid printed brief in the Court of Appeals at pages 32-36), the next ensuing events included (*id.*, 36-37):

> "Salvatore was brought back to the courtroom gagged and shackled (May 31); whereupon his brother Carmine said 'You better gag me too' to which the Court rejoined 'I will. Gag him too.' When Mr. Aronne pleaded with the Court that Carmine is 'emotionally upset because of his brother's condition' the Court's reply was 'That may be. He is going to be gagged' (6088-6091).
>
> From this point on the trial resembled more a series of intermittent scenes from Bedlam, than an American courtroom of justice. With the two Panico brothers sitting in the courtroom bound and gagged before the eyes of the jury, with Salvatore continuing to suffer his psychotic outbursts—in words, whenever the gag happened to be removed; by grotesque pantomine movements, while the gag was on him—there was from this point on, and there could be, no trial in any realistic sense of that word. Their necks and heads torn by the adhesive tape of the gags placed upon them on the first day of the gagging (6156—more 'comfortable' gags were later ordered by the Court), their bodies cramped by the ever-present shackles, and most important of course, their spirits crushed by the humiliation of wearing these regalia of bodily restraint, the Panico brothers were obliged to sit in this vile condition through the ensuing two weeks and more of this trial, day in and day out, because the Trial Court believed that Salvatore's conduct was part of a mass plot by the defendants and all of their attorneys to disrupt the trial."

(3) The Government's two briefs make no mention of the fact that Trial Judge MacMahon's renewal of the psychiatric examination of the petitioner following his two suicide attempts had to be compelled by a writ of mandamus from the Court of Appeals. (4) After those suicide attempts, and before the mandamus just mentioned, the following took place (as recited in our aforementioned printed brief at pp. 40-41):

> "On June 11, 1962, after the second suicide attempt (the razor-slashing), Salvatore's attorney pointed out to the Court that the defendant was in pain from the slashes on his bandaged arms, that there were tears streaming from his eyes, but the Court unyieldingly refused to interrupt the trial (7222, 7237-7238). The Court derided Salvatore's mental agonies ('mental condition, my eye'—7371).
>
> On that same day (June 11) a revealing incident in the trial exposing the Court's own emotional affect towards the Panicos (as towards all of the defendants), occurred when the Court spoke of the gags on the Panico defendants as 'muzzles'—an apt term to describe the condition of creatures who are being treated like dogs rather than human beings (7252). A little later that same day the Court's simplistic approach to the situation was again indicated when, in response to a new defense request to remove the gag from Carmine, the Court refused on the ground that he had seen Carmine 'looking daggers' at him (7317-7318, 7371-7373).
>
> On June 14, 1962, the Court refused to allow medicine to be given to Salvatore when his attorneys represented to the Court that he was feeling nauseous (7677, 7678). Shortly after this, when the gag was momentarily removed, he groaned incoherently 'MacMahon, I'll be dead,' whereupon (the record reads)

> 'the marshals immediately regagged the defendant Salvatore Panico,' the Court ordered 'Take him out', 'the defendant Salvatore Panico was removed from the courtroom, making muffled sounds through his gag', (7735-7736).
>
> On June 18, 1962, in response to defense requests for psychological treatment for Salvatore, whose condition was growing worse and worse, the Court announced its unique medical theory—which we paraphrase—that a claimed lunatic need not be medically examined for his claimed lunacy when the claimed lunatic 'refuses to cooperate' in the examination (8194)."

C. The Government's description of petitioner's second suicide attempt (by slashing his arms with a razor) omits the following on-the-spot report of the "Nursing Notes" from the Prison records, which are set forth in our supplemental appendix (of which nine copies have been filed in this Court), the item in question appearing in the form of a photo-offset which is the third such photo-offset sheet following p. 116a of said printed appendix:

> "Inmate was found writhing on floor in shower room on the second floor, covered with blood; in an emotionally disturbed, delirious and disoriented mental state. * * * "

This documentation was, of course, before Trial Judge MacMahon. Nevertheless, Judge MacMahon never relented from his conviction that the petitioner had 'faked' his suicide attempts.

IV

In the Government's discussion of the psychiatric testimony of Dr. Arnett—the Court-appointed physician who, upon examining petitioner on May 25, 1962, diagnosed him

to be incapable of standing trial at that juncture, but who later gave a different diagnosis after petitioner had had a chance to calm down for a few days—does not take into account that Dr. Arnett's diagnosis of May 25, 1962, being immediately close in time to the happenings in which petitioner committed his most egregious contemptuous misconduct, leaves standing on the record undisturbed and unallayed by any subsequent diagnostic situation, a sole and unchallenged medical diagnosis by a Court-appointed psychiatrist to the effect that the petitioner must indicatedly have been incapable of entertaining the legally requisite scienter to commit the single most outrageous of his allegedly contemptuous acts in this trial—this particular act of the petitioner, viz., his charging into the jury box with violent and verbally obscene manifestations, being the "bete noire" item in the entire catalogue of the petitioner's allegedly contemptuous performances.

V

The Government's suggestion (Br. in Opp. 21) that the post-conviction events of petitioner's having been diagnosed as schizophrenic "should be given no weight in the Court's deliberation here" because those events "do not appear in the record here", and because "the Government was not a party" to the adjudication proceedings involved (as to petitioner's sanity), and because "we [the Government] have had no opportunity to inquire into the circumstances which surrounded" those post-conviction events, is a suggestion which, at any rate, has not entered these proceedings under the sole signature of the Solicitor General himself (as is true of the "Supplement" to the Government's Brief in Op-

position). We had thought that it was made perfectly clear in our petition for certiorari (and its printed appendices) that the post-conviction events in question were expressly, and *documentarily*, before the Court of Appeals. We had thought that the unsatisfactory posture of the "record-filing" in this matter in the Court of Appeals, as set forth in detail in our petition for certiorari, would operate to deter both sides in this controversy from searching "with eagle's eyes" for technical advantages derivable from the posture of the "record". We had thought that in a case where the processes of law are being called upon to deal wisely and fairly with the at least colorable agonies of a human being afflicted by mental disease, the narrow metrical predilections of the adversary legal mind would be foreborne.

In any event, the documents establishing petitioner's post-conviction adjudication of insanity (the medical diagnosis therefor having first been made by the prison psychiatrist at Sing Sing just two days after petitioner's sentencing in the narcotics case) were undisputedly distributed to the Court below by the Clerk of that Court and are expressly referred to in Judge Friendly's dissenting opinion (see the appendices to our petition for certiorari herein). This being so, those documents are not improperly before this Court, whatever be thought to be their technical "record" posture at this moment. And, if the present record posture of those documents—whose importance is so manifest—does preclude their being taken into consideration by this Court in ruling on this petition for the full purposes of a grant or denial of certiorari, we respectfully suggest that for this very reason the Court might properly wish to entertain continuing jurisdiction by an order of remand which would direct that the contempt

trial proceedings be reopened for readjudication in the light of those documents and evidence relating thereto. Such an order of remand, we would hope, would direct that the reopened trial proceedings be conducted pursuant to Rule 42(b) (F. R. Cr. P.), but at the least the Rule 42(a) proceeding itself should be reopened for this purpose.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our petition for certiorari, together with the supporting documents filed in support thereof, it is respectfully submitted that the petition for a writ of certiorari should be granted; or, in the alternative, that an order of remand as requested in our last preceding paragraph herein be granted.

Respectfully submitted,

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